Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-149

LILLIE F. FITZGERALD,

Petitioner,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a corporation,
&
STEPHANAE FITZGERALD,
&
EDITH FITZGERALD,
&
THE OHIO STATE LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Lillie F. Fitzgerald, petitions this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

This case comes before the Court in two Dimensions. The First dimension deals, indirectly, with a certain judgment and order entered by the United States Court of Appeals for the District of Columbia Circuit enjoining Petitioners from completing prosecution of a Domestic Relations cause in the Wayne County Circuit Court, Michigan at Detroit. The Second dimension deals squarely with a judgment and order and decision entered by the United States Court of Appeals for the District of Columbia Circuit, reversing a judgment and order entered by the District Court in an Interpleader action.

In Appeal Number 74-1485 the issue before the Court was whether or not a Federal District Court could restrain and enjoin a State Court Proceeding where the Federal District Court had jurisdiction over actions in the nature of Interpleader, an action in rem, and where the State Court Action was one in personam and not involving the subject matter of the res in Interpleader. On June 20, 1975, the Court of Appeals entered a Judgment affirming the District Court's injunction. A copy of that Judgment with Memorandum is annexed hereto as *Appendix 1a through 1c.* Since the cause was an Interlocutory Judgment, a Petition for Certiorari was not filed in this Court.

The cause proceeded to trial on the merits before the District Court, in Interpleader. The Trial was put to the District Court, sitting without a Jury. On April 21, 1975, the District Court entered a Judgment in favor of the Petitioner. *Appendix 2* with Memorandum, *Appendix 3a to 3h.* That judgment and order was rendered in favor of the Petitioner which entitled Petitioner to a money judgment in the amount of $89,496.57, the amount then held in the Registry of the Court as is required in all Interpleader actions.

The Respondents thereafter filed a Motion for Stay of Execution of the Judgment without posting Supersedeas Bond as is required by the Federal Rules of Civil Procedure, *Rule 62(a) and (b), F.R. Civ.P.* The District Court entered an Order

granting Stay of Execution of the Judgment and required Respondents to post a meager $100.00 bond for cost. Thereafter, Petitioner filed a Motion with the Court of Appeals seeking an Order directing the District Court to Disburse funds. *Appendix 4.* Thus, the way was paved for Respondents to perfect an Appeal from a judgment awarding money to Petitioner, without posting a Supersedeas Bond as is required by the Federal Rules of Civil Procedure. *Rule 62, supra.* The cause proceeded on Appeal before the Court of Appeals. On May 27, 1977, the Court of Appeals entered a decision reversing the District Court Judgment and ruled in favor of Respondents without giving reasons well documented by case law and statutory law. *Appendix 5a through 5e.*

Petitioner filed a Petition for Rehearing and Suggestion En Banc. On June 27, 1977, The Court of Appeals entered Orders denying Petition for Rehearing and Petition for Rehearing En Banc. *Appendix 6 and 7.* Since the Judgment of the Court of Appeals reversed the District Court's Judgment and Order thereby entitling the Respondents to disbursement of the Proceeds held in the Registry of the Court, Petitioner filed a Petition for Stay of Mandate pending filing of Petition for Certiorari in this Court. On July 14, 1977, the Court of Appeals entered an Order granting Stay of Mandate Pending filing of Petition for Certiorari in this Court. *Appendix 8.*

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the Judgment of the United States District Court for the District of Columbia, was dated and entered on May 27, 1977. *Appendix 5a through 5e.* The Order denying Petition for Rehearing and Rehearing En Banc was entered on June 27, 1977. *Appendix 6 and 7.* The jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

QUESTIONS PRESENTED

I.

Whether a Federal Court may enjoin and restrain State Court Action where an action in Interpleader has been filed in the Federal Court and the Res deposited there while the action in a State Court involves an action in personam without violating the provisions of 28 U.S.C. 2283?

II.

Whether the granting of an exception to Rule 62 F.R.Civ.P. thereby affording an unsuccessful litigant in the District Court an opportunity to perfect an appeal constitutes a denial of Equal Protection of the Laws under the United States Constitution?

III.

Whether or not a Federal Court of Appeals may interpret orders and judgments involving the procedural laws of a State issued by a State Court when, by a simple comparison of Federal Rules of Procedure, the conclusions drawn by a Federal Court are in violation of Federal Rules of Civil Procedure, without violating the equal protection clause of the Constitution and the Denial of procedural and substantive due process of law?

IV.

Whether or not the conclusions drawn by a Court of Appeals, clearly based upon a record containing multiple procedural errors as well as errors of substantive law, constitute a taking of property without first affording equal protection of the laws and due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.
Fourteenth Amendment, United States Constitution.

STATUTES INVOLVED

28 U.S.C. 2283, provides as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

28 U.S.C. 2361, provides as follows:

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court . . ."

FEDERAL RULE INVOLVED

Rule 62, F.R. Civ.P., provides as follows:

"(a) Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry–

(b) In its discretion and on such conditions for security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment . . ."

. . . . . .

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. . . . The stay is effective when the supersedeas bond is approved by the court."

STATEMENT OF THE CASES

The actions were initially brought by Petitioner, Lillie F. Fitzgerald, in the United States District Court seeking damages due to breach of contract and for other relief. It was not until the Connecticut General Life Insurance Company and The Ohio State Life Insurance Company (as well as New England Mutual Life Insurance Company, Appeal No. 74-2015) were served with a copy of the summons and complaint that an Answer was filed on behalf of each and in those answers, Counterclaims were filed by the Three Insurance Carriers sounding in Interpleader. The original action brought by the Petitioner, against each Insurance Carrier, was dismissed, without prejudice as to each, and the cause proceeded on the Counterclaims sounding in Interpleader.

It was the Petitioner, Lillie F. Fitzgerald, who first sought to have the validity of the Wayne County Circuit Court determined by that Court rather than the United States District Court. Ironically, it was the Respondants who sought and obtained a Temporary Restraining Order and Preliminary Injunction enjoining and restraining Lillie F. Fitzgerald, from prosecuting her action in any other Court in the United States. These appellants now raise questions as to jurisdiction which they successfully advanced during the initial stages of these very same cases. Additionally, this Court in fact sustained the Trial Court's order granting the Appellants the Preliminary Injunction in Appeal Number 74-1485. Petitioner Lillie F. Fitzgerald later dismissed, on motion, her interlocutory appeal since *the Court decided the appeal after the Court had entered an order granting the Motion,* unopposed, to

dismiss the interlocutory appeal. (emphasis supplied). Appellants now contend that the District Court had not jurisdiction when in fact they contended all along that the District Court did have jurisdiction.

Cross Motions for Summary Judgment were filed and argued before the District Court. The motions were denied and the cause proceeded to Trial to the Court, sitting without a jury. It was Petitioner, Lillie F. Fitzgerald, who demanded a jury trial and on the day of Trial, withdrew her demand for jury trial and elected to proceed to trial before the Court. Respondants voiced no objection when in fact they could have and now, as they find, no doubt should have. During the Trial, Respondants presented no evidence nor did any witnesses testify on their behalf. It was Petitioner Lillie F. Fitzgerald, who testified and who presented documentary evidence during the Trial in addition to the transcripts of depositions of Judge Christopher Brown and Attorney William Hatchet. Even prior to notice that Appellee would rely on the transcripts of those depositions, Appellants voiced no objection other than an objection based upon the Michigan's Dead Man Statute. On April 21, 1975, the District Court entered judgment in favor of the Petitioner, Lillie F. Fitzgerald.

Prior to the Tenth day, the day on which judgment was to have been executed, the Respontants filed a Motion for Stay and obtained that stay on the condition that they post One Hundred Dollars for cost. Petitioner filed an emergency appeal to this Court but the Court affirmed the Trial Court's Order granting stay of disbursement of funds held in the Registry of the Court. That stay was obtained without posting a supersedeas bond as required by the Federal Rules of Civil Procedure.

Respondants thereafter filed a Notice of Appeal to this Court, without posting a supersedeas bond as is required by the Federal Rules of Procedure, Rule 62.

In construing a Preliminary Injunctive Order entered by the Circuit Court for Wayne County, Detroit (April 28, 1972) with the Temporary Retraining Order entered by the Circuit

Court of Wayne County, Detroit (May 19, 1972), the Court of Appeals incorrectly determined that a Temporary Restraining Order superseded a Preliminary Injunctive Order in scope and effect.

CONNECTICUT GENERAL LIFE INSURANCE STATEMENT OF FACTS

The Petitioner, Lillie F. Fitzgerald, and the subject-decedent, Clemens H. Fitzgerald were lawfully married at Alexandria, Virginia on May 4, 1971. No children were born of the Union.

On May 8, 1970, the insured, Clemens H. Fitzgerald, deceased, hereinafter referred to as "the insured" applied for a life insurance policy (No. 1349216) in the amount of $50,000. That policy was issued at Detroit, Michigan through the plaintiff local, District Office on June 26, 1970.

The insured thereafter applied for another life insurance policy on July 27, 1970 (No. 1359066) in the amount of $30,000. That policy was likewise issued at Detroit, Michigan through the plaintiff's local District Office on August 1, 1970.

Under Policy Number 1349216, the insured initially named Stephanae Fitzgerald his daughter, as primary beneficiary and Edith Fitzgerald, his mother, as Contingent beneficiary.

Under Policy Number 1359066, the insured named Edith Fitzgerald, his mother, as primary beneficiary and Stephanae Fitzgerald his daughter, as Contingent beneficiary.

After the marriage of the insured to the Lillie F. Fitzgerald, the insured changed the beneficiaries hereinbefore named thereafter naming the petitioner, Lillie F. Fitzgerald as primary beneficiary under both policies.

1. That on or about July 2, 1971, the Carrier accepted, as designated beneficiary under policy number 1349216, Lillie F. Fitzgerald, pursuant to a beneficiary change form signed by the insured, now deceased, Clemens H. Fitzgerald.

2. That under the terms and condition setforth in policy number 1349216, plaintiff agreed to pay to Lillie F. Fitzgerald the sum of Fifty Thousand Dollars ($50,000.00) upon the death of the insured, now deceased, Clemens H. Fitzgerald.

3. That on or about July 2, 1971, the Carrier accepted, as designated beneficiary under policy number 1359066, Lillie F. Fitzgerald pursuant to a beneficiary change form signed by the insured, now deceased, Clemens H. Fitzgerald.

4. That under the terms and condition setforth in policy number 1349216, plaintiff agreed to pay to Lillie F. Fitzgerald, the sum of Thirty Thousand Dollars ($30,000.00) upon the death of the insured, now deceased, Clemens H. Fitzgerald.

5. That on or about April 28, 1972, the Circuit Court of Wayne County, State of Michigan, issued an Injunctive Order in an action entitled "Lillie Fitzgerald v. Clemens H. Fitzgerald, Jr.", Civil Action No. 206387, restraining Clemens H. Fitzgerald, the insured and now deceased, his agents, servants, employees and attorney and any other person in active concert – or participation with them who actually receive notice of this Injunctive Order from disposing of the parties existing insurance or changing the beneficiaries thereon.

That in spite of said Court Order of which the insured was personally served, the insured decedent, did in fact change the beneficiaries on said policies.

6. That the copy of said Preliminary Injunctive Order attached to the Complaint filed by the Petitioner herein was a Certified true, genuine copy or is an accurate duplication of the original Preliminary Injunctive Order dated April 28, 1972.

7. That after the death of Clemens H. Fitzgerald on April 3, 1973, written demands for payment of the proceeds under policies numbered 1349216 and 1359066 were made at the Insured's Detroit Offices on May 1, 1973; May 16, 1973; June 5, 1973; June 16, 1973; August 2, 1973 and August 14, 1973.

8. That a Certified copy of the Preliminary Injunctive Order issued by the Circuit Court of Wayne County was forwarded to the Insured by the Petitioner, Lillie Fitzgerald under a letter dated May 16, 1973.

That on the date of issuance of the policies hereinbefore referred to, the insured was a resident and domiciliary of the State of Michigan.

That the applications for insurance were executed, dated, and witnessed at Detroit, Michigan.

That the Carrier, Connecticut General Life Insurance Company Inc., is licensed to do business in the State of Michigan and was so licensed on the date of issuance of the policies and on the date of contracting and delivery of the policies.

That the application for the insurance policies were presented to Mr. Edward Pearson, a then employee, who was a life insurance agent licensed by the State of Michigan and authorized to forward applications for life insurance to the carrier.

That the insured paid the initial premiums on both policies at Detroit, Michigan, County of Wayne, State of Michigan. That said payments were made at 2655 Evergreen Road, Suite 1202, Southfield, Michigan 48076, a Branch Office maintained by the Plaintiff in the State of Michigan.

That upon issuance of policies numbered 1349216 and 135066, both policies were physically delivered to the insured in the State of Michigan.

That the policies took effect and were delivered and the first premiums paid by the insured at Detroit, Michigan.

STATEMENT OF FACTS AS TO THE OHIO STATE LIFE INSURANCE COMPANY

On December 5, 1963, the Carrier, Ohio State, issued a policy of life insurance, numbered 512,551, on the life of and to one Clemens H. Fitzgerald, payable to his daughter, Stephanae Fitzgerald and beneficiary, or her estate.

On May 28, 1971, the deceased insured executed and had delivered to the Company a request for change of beneficiary making the policy payable to his wife, Lillie Fitzgerald, as beneficiary.

Ohio State accepted the designation of beneficiary.

Under the terms of the policy, Ohio State agreed to pay to Lillie F. Fitzgerald, the sum of Fifteen Thousand Dollars ($15,000.00) upon the death of Clemens H. Fitzgerald.

That on or about April 28, 1972, the Circuit Court of the County of Wayne, State of Michigan, issued an Injunctive Order in an action entitled "Lillie Fitzgerald v. Clemens H. Fitzgerald, Jr." Civil Action No. 206387, restraining Clemens H. Fitzgerald, the insured and now deceased, his agents, servants, employees and attorney and any other person in active concert in or participation with them who actually receive notice of this Injunctive Order from disposing of the parties existing insurance or changing the beneficiaries thereon.

That in spite of said Court Order, a copy of which was personally served upon the insured-deceased, the insured did on or about August 10, 1972 execute and deliver to the defendant a further request for change of the beneficiary making said policy payable to his mother, Edith Fitzgerald, as beneficiary.

That the copy of said Preliminary Injunctive Order attached to the Complaint filed by the Plaintiff herein was a Certified, true, genuine copy or is an accurate duplication of the original Preliminary Injunctive Order dated April 28, 1972.

That after the death of Clemens H. Fitzgerald on April 3, 1973, the plaintiff made written demands for payment of the proceeds under the policy. That said demands were made at Detroit, Michigan and Columbus, Ohio.

That a certified copy of the Preliminary Injunctive Order issued by the Circuit Court of Wayne County was forwarded to the insured by the petitioner and/or her counsel under a letter dated April 9, 1973 and May 14, 1973.

That on the date of issuance of the policies hereinbefore referred to, the insured was a resident and domiciliary of the State of Michigan.

That the applications for insurance were executed, dated and witnessed at Detroit, Michigan.

That the Carrier, Ohio State Life Insurance Company, Inc. is licensed on the date of issuance of the policy and on the date of contracting and delivery of the policy.

That the application for the insurance policy was presented to one J.L. Carlin, an Agent for the insurance policy, acting for and on behalf of the Carrier, Ohio State Life Insurance Company.

That the insured paid the initial premiums on the policy at Detroit, Michigan and said premiums were accepted there.

That upon issuance of the policy numbered 512,551, said policy was physically delivered to the insured in the State of Michigan.

That the policy took effect and was delivered and the first premiums paid by the insured at Detroit, Michigan.

After the death of the Insured, Clemens Fitzgerald, Petitioner made numerous demands upon both Carriers to make payments in accord with the terms of the Policies. The Carriers refused to make payments. Petitioner thereafter filed suits in the U.S. District Court seeking damages due to Breach of Contract. No actions in Interpleader were filed by the Carriers until the initial complaints for breach of contract had been filed against them by Petitioner. Both Carriers, Connecticut General and The Ohio State, thereafter filed, in a responsive pleading, Answers to the Complaints and Counterclaims in Interpleader.

SUMMARY OF ARGUMENT

Under *Rule 62, F.R.Civ.P.*, the Trial Court should have dismissed the action and right of appeal for failure on part of appellants to post a supersedeas bond as required by the Rule.

Rule 62(b) grants power to a Federal District Court to enter a Stay of execution of Judgment only on condition that a Motion for New Trial or to alter or amend the judgment has been filed. *Rule 62, supra,* does not empower the District Court to deny a successful party the right to execute on a money judgment.

28 U.S.C. 1335, vest original jurisdiction in the Federal District Court. To that extent and to that end, the district court assume jurisdiction as the Forum State and under the conflict of laws rule, may look to the laws of a foreign jurisdiction where the contract was executed so long as the laws of the foreign jurisdiction pertain to matters of substantive law and not procedural law.

In an interpleader action where no claims are made against the deceased or his estate, the dead man's statute is inapplicable.

The findings of the Trial Court, sitting without jury, are presumptively correct. A court of appeals may review both the law and the facts but the judgment of the trial court may not be set aside except for errors of law and unless it appears that the judgment is plainly wrong or without evidence to support it.

The Judgment by the Trial Court was supported by the weight of the evidence adduced by Petitioner, Lillie F. Fitzgerald.

A Federal Court may not enjoin and restrain State Court Action where an action in Interpleader has been filed in the Federal Court and the Res deposited there while the action in a State Court involves an action in personam without violating the provisions of 28 U.S.C. 2283.

Departure from the strict requirements imposed by Rule 62 of the Federal Rules of Civil Procedure constitutes a denial of equal protection of the laws and a denial of due process of law.

A Federal Court may not reverse long standing rules regarding Injunctions while construing the effect of State Court injunctions without violating the equal protection clause of the Federal Constitution.

REASONS FOR GRANTING THE WRIT

I. The need for clarification, by base line distinctions, of the rule forbidding Federal Courts from enjoining State Court action in light of the provisions of *28 U.S.C. 2361* granting District Court's the power to issue injunctions against proceedings brought in State Court affecting the property, becomes apparent in light of the multiple errors committed by the courts below. This Court had held, and other Courts have aligned themselves with this court, that even though the Federal Court has jurisdiction of an action in Interpleader, it has no power to enjoin a related state court proceeding, particularly on matters over which the Federal Court has no jurisdiction. *Maryland Casualty Co. v. Pacific Coal & Iron Co., 312 U.S. , 61 S.Ct. 510 (1941); Aetna Casualty & Surety Co. v. Yeatly, 99 F.2d 665 (C.A. 4th, 1938); 6 Moore's Federal Practice #57.28 (2d. ed.).*

In Hill v. Martin, 296 U.S. 393, 403, this Court warned that:

> "Proceedings which a federal court is forbidden to enjoin includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of final process."

Manufacturers Record Publishing Co. v. Lauer, 268 F.2d 187 (C.A. 5th), cert. den. 361 U.S. 913 (1959); Furnish v. Board of Medical Examiners of California, 257 F.2d 520 (C.A. 9th, cert. den. 358 U.S. 882 (1958); Steffanelli v. Minard, 342 U.S. 117 (1951); Younger v. Harris, 401 U.S. 31 (1971). See also 35 Columbia L. Rev. 545 (1947), discussing 28 U.S.C. 2283.

II. The decision entered by the Court of Appeals turned upon an incorrect interpretation of two orders entered by the Circuit Court for Wayne County. The Order entered by that Court, dated April 28, 1971, which, as a Preliminary Injunction Order, enjoined Clemens Fitzgerald from, inter alia, "any way disposing of the parties' now existing insurance or changing the beneficiaries thereon". The Order of May 19, 1972,

which, as a Temporary Restraining Order, simply restrained Clemens Fitzgerald from, inter alia, "in any manner disposing of any bank accounts, personal property or interests in real estate."

The issue before the Court then, is whether or not, after legal actions have been consolidated, an undissolved *Preliminary Injunctive Order* is thereby superseded or dissolved by an additional Temporary Restraining Order?

The Court in its Opinion used the term "supreseded". In Petitioner's view, the term is misplaced. The proper frame of reference relative to the life of an injunctive Order is "dissolution". As a rule and the authorities are uniformed and are legion, a temporary restraining Order is merely a temporary order entered pending a full hearing. That full hearing would normally take the character of a preliminary injunction proceedure *Rule 65(a). (b). F.R. Civ. P.* The life of a Temporary Restraining Order is 10 (ten) days and that Order is automatically dissolved unless extended. The Temporary Restraining Order obviously does not "supersede" nor does it dissolve a Preliminary Injunctive Order. Nor does the consolidation of two or more cases. Nor does this Court have the power to enter upon the inquiry since the Temporary Restraining Order is interlocutory on its face, and is therefore not appealable, either directly or indirectly. *Schainmann v. Vrainard, 8 F.2d 11 (C.A. 9th, Cal. 1925); St. Helen v. Wyman, 222 F 2d 890 (C.A. 9th, 1955); Madison Shipping Corp. v. National Maritime Union, 273 F.2d 955 (C.A. 3rd, 1960); Ross v. Evans, 325 F.2d 160 (C.A. 5th, Ga. 1963).* See also *National Mediation Board v. Air Line Pilots Asso. International, 116 App. D.C. 300, 323 F.2d 305(1963)* where this Court held that an Order extending a temporary restraining order beyond the 20 days allowed by the rule was held tantamount to the grant of a preliminary injunction. But here, the chronological date of the two orders involved are in reverse. The Preliminary Injunctive Order was entered on *April 28, 1972.* That Order was never dissolved by Court order. Nor does the Michigan Statute or case law support the

rule of practice that a Preliminary Injunctive Order is dissolved or superseded by the subsequent entry of a temporary restraining order (May 19, 1972). Notably, the May 19, 1972 order specifically labeled the order as "a temporary restraining Order". See also *Kuizema v. Breen, 316 Mich. 492, 25 N.W.2d 596 (1947).*

Michigan Courts are all in accord with the rule which states that transfers of property in violation of an injunctive Order (April 28, 1972) are invalid and may be set aside by the party to a divorce suit, and the subsequent death of the injunctive violator does not prevent the Court from exercising that power. *Webb v. Webb, 375 Mich. 624, 134 N.W.2d 673 (1965); Candler v. Wallace Candler, Inc., 365 Mich. 613, 113 N.W.2d 901 (1962); Candler v. Donaldson, 272 F.2d 374 (C.A. 6th, 1951).*

The settlement agreement referred to in the Court's Opinion and according to the Court's interpretation was not supported by the trial record nor by the law. Under Michigan Law, there must be a full and frank disclosure made during settlement discussions. There was no agreement by the Appellee that she relinquish her interest in the Life Insurance Policies. *Michigan Law, MCLA 702.72a(2) (1973); Westgate v. Westgate, 291 Mich. 18, 288 N.W. 860 (1939); Isabell v. Isabell, 333 Mich. 519, 53 N.W.2d 359 (1952); Connecticut Gen. Life Ins. Co. v. Hartshorn, 238 F.2d 417 (9th Cir. 1956).*

The factual findings by the lower Court were correct and an appeal, where trial has been held to the Court, the appellate Court will and does presume that the findings of the lower court were correct and that Court properly applied the law to the facts. *Lawson v. U.S. Mining Co., 207 U.S. 1 (1907); Colby v. Riggs Nat. Bank, 67 App. D.C. 259, 92 F.2d 183 (1937); Metropolitan Casualty Ins. Co. v. Hoage, 63 App. D.C. 307, 72 F.2d 175 (1934).* The settled rule further has it that the judgment of the trial court may not be set aside on appeal except for errors of law and unless it appears, plainly on its face, that the judgment is plainly wrong or without

evidence to support it. *Reese v. Crosby 280 A.2d 526 (D.C.C.A. 1971); $3265.28 U.S. v. District of Columbia, 249 A.2d 516 (D.C.C.A. 1969).* The Court was therefore bound by the Trial Court's findings and could not properly substitute its judgment for the judgment of the trial court.

The cause on appeal did not properly belong before the Court inasmuch as the appellants had failed to post a supersedeas bond as required by *Rule 62, F.R. Civ. P. (a).* A Stay may be granted without posting a supersedeas bond in order to stay execution of judgment after 10 days where (a) the losing party has filed a Motion for new trial, or, (b) filed a Motion to alter or amend a judgment made pursuant to Rule 59, or (c) filed a Motion for relief from judgment, or (d) filed a Motion for Judgment, or, (e) filed a Motion for amendment to the findings or for additional findings. The appellees filed neither of the foregoing motions nor did they post a supersedeas bond. The appeal should have been rightfully dismissed. Notably, appellee, Lillie F. Fitzgerald, filed an appeal to this Court. This Court affirmed the District Court's Order granting a Stay by posting simply $100.00 for costs. The unequal application of Rule 62 constituted a denial of procedural and substantive due process of law under the United States Constitution. The unequal application of Rule 62 F.R.Civ.P., constituted a denial of equal protection of the laws under the Federal Constitution. Under *Rule 62, F.R.Civ.P.*, when an appeal is taken, the appellant, by giving a supersedeas bond, may obtain a stay subjection to the exceptions contained in subdivision (a) of *Rule 62*, supra. But the District Court and the Court of Appeals did not require appellants to post such a bond. What the Courts simply did was enter an Order granting Stay of Execution of Judgment provided One Hundred Dollars ($100.00) for costs was posted. Thus, the denial of Petitioner's invokement of Rule 62 constituted a denial of equal protection of the laws.

III. The rule is elementary that the life of a Temporary Restraining Order last for ten days and may be extended for an additional ten days upon issuance of an Order by the

Court. *Rule 65(b), F.R.Civ.P.* prohibits the extension of Temporary Restraining Orders for more than 10 days. Logically, a Temporary Restraining Order entered on a date *after* Preliminary Injunctive Orders are issued does not supersede the Preliminary Injunctive Order. Nor did the Court of Appeals have jurisdiction nor the power over matters involving an in personam action emanating out of the Circuit Court for Wayne County, Detroit, Michigan. As this Court has held, a restraining order is merely a temporary order entered in an injunction suit, without notice, if necessary, and upon summary proceeding to prevent immediate and irreparable injury pending a fuller hearing and/or right to a preliminary injunction. *Houghton v. Cortelyou, 208 U.S. 148 (1908).* Since the Federal Courts had no jurisdiction over the subject matter nor the parties, the Court's construction of the Injunctive Orders was incorrect in any event. See *Magnolia Petroleum Co. v. Thompson, 106 F.2d 217 (C.A. 8th, 1939),* reversed on other grounds, *Magnolia Petroleum Co. v. Thompson, 309 U.S. 478 (1940).*

IV. The decisions entered by the Federal Courts below are so inconsistent with decisions emanating out of other jurisdictions and decisions issued by this Court that the need for clarification is imperative.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that her Petition for Writ of Certiorari to review the Decision of the United States Court of Appeals for the District of Columbia Circuit be granted; That an Order to that effect be entered, and the Court below and the Counsel be notified of the Granting of the Petition.

Respectfully submitted,

CLEMENT THEODORE COOPER, ESQUIRE
918 F Street, N.W. (300-302)
Washington, D.C. 20004

Attorney for Petitioner

APPENDICES

APPENDIX 1

United States Court of Appeals
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 74-1485 September Term, 1974

Civil 1676-73

Connecticut General Life Insurance
Company, a corporation
v.
Lillie F. Fitzgerald, Appellant
Edith L. Fitzgerald, et al

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BASTIAN,* Senior Circuit Judge, WRIGHT and McGOWAN, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court is hereby affirmed, for the reasons stated in the attached memorandum.

Per Curiam
For the Court
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

*Senior Circuit Judge Bastian sat as a member of the court during deliberations on this case, but died before the judgment and accompanying memorandum were prepared.

MEMORANDUM OPINION

Lillie Fitzgerald was the beneficiary under several life insurance policies covering her husbands life. At the time of their divorce, it was adjudged that Lillie would continue to have the right to the proceeds of the policies, and a permanent injunction was entered barring her husband, Clemens, from making any change of beneficiaries.

At the time of Clemens's death, Lillie was no longer the named beneficiary, having lost that status to Clemens's mother and daughter. All three parties applied for benefits under the policies. The insurance companies filed suit under the Federal Interpleader Act, 28 U.S.C. §1335, to avoid multiple liability, and were discharged from the action after paying the proceeds into the registry of the court.

Meanwhile, Lillie sought to reopen her Michigan divorce proceeding to obtain redress for Clemen's apparent violation of the injunction against changing beneficiaries of the policies. In essence, what was being sought was a determination that the change was without legal effect due to the divorce court's injunction. Such a determination would have been res judicata on the issue of proper beneficiaries and would have deprived the district court of any meaningful decision in the interpleader action. To avoid such a result, the district judge enjoined Lillie from proceeding with the Michigan action. It is that order that is under appeal.

It is clear that a district judge has the power to enjoin any proceeding in a state court affecting the property involved in an interpleader action. 28 U.S.C. §2361. While the litigation in Michigan would not have resulted in an order to pay the proceeds to Lillie, it would have served as a final determination of Clemens's right to name his mother and daughter as beneficiaries. Such a judgment would resolve questions at issue in the district court action, thereby having an effect on the rights of the parties in the property. To avoid the resolution of significant questions at issue in the interpleader

action being made in the Michigan Courts where not all the parties of interest were involved, it was proper for the district court to issue its injunction under 28 U.S.C. §2361. The judgment is affirmed.

APPENDIX 2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, INC., Plaintiff, v. LILLIE F. FITZGERALD, et al., Defendants.	Civil Action No. 1676-73
THE OHIO STATE LIFE INSURANCE COMPANY, INC., Plaintiff, v. LILLIE F. FITZGERALD, et al., Defendants.	Civil Action No. 1610-73

JUDGMENT

These consolidated cases came before the court for trial without jury. The court having found that Lillie Fitzgerald is entitled to the proceeds of Connecticut General Life Insurance policies 1349216 and 1359066 and Ohio State Life Insurance policy 512-551 for the reasons stated in the accompanying Memorandum, it is by the court this 21st day of April, 1975,

ORDERED that judgment be entered for Lillie Fitzgerald in Civil Action Nos. 1610-73 and 1676-73.

/s/ Thomas A. Flannoy
Thomas A. Flannoy
UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, INC., Plaintiff,	)	
v.	)	Civil Action No. 1676-73
LILLIE F. FITZGERALD, et al., Defendants.	)	
THE OHIO STATE LIFE INSURANCE COMPANY, INC., Plaintiff,	)	
v.	)	Civil Action No. 1610-73
LILLIE F. FITZGERALD, et al., Defendants.	)	

MEMORANDUM

These consolidated actions came before the court for trial without jury on February 18, 1975. The court has considered the testimony, exhibits and post-trial memoranda submitted by the parties. This Memorandum shall constitute the court's findings of fact and conclusions of law pursuant to rule 52(a) of the Federal Rules of Civil Procedure.

In its Order filed September 27, 1974, denying cross-motions for summary judgment, the court found that the only genuine issue of material fact was whether the deceased, Clemens Fitzgerald, had knowledge of the Preliminary Injunctive Order issued April 28, 1972 by the Circuit Court for the County of Wayne, Michigan. That Order, issued pursuant to an action filed by Lillie Fitzgerald, wife of Clemens, restrained him from disposing of his property prior to the conclusion of the suit or changing the beneficiaries of his insurance policies. Nonetheless, subsequent to the date of the Order, Clemens eliminated his wife Lillie as beneficiary of the three insurance policies at issue.[1] If Clemens had actual knowledge of the Injunctive Order then the beneficiary changes are invalid and Lillie is entitled to the proceeds of the policies.

Lillie testified in support of her case, and presented the deposition testimony of two other persons, Judge Christopher C. Brown and Mr. William M. Hatchett. Since the court deferred rulings on the objections of Edith and Stephanae Fitzgerald to the admissibility of each witness' testimony, that determination must now be made.

Edith and Stephanae object to Lillie's testimony on two grounds, that it is hearsay and that it is barred by the Michigan dead man's statute. *See* Mich. Comp. Laws. Ann. §600.2166; Mich. Stat. Ann. §27A.2166 (1974 Supp.). Turning first to the hearsay objection, the court finds inadmissible Lillie's testimony concerning statements allegedly made to her by Clemens in a phone conversation on April 18, 1972. The statements were offered solely for the purpose of establishing that Clemens was in fact served with the Injunctive Order and had notice of its issuance. They are an attempt to prove the matter asserted by the statements of a person who is not before the court and cannot be cross-examined. Since these statements are a classic example

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[1] Connecticut General Life Insurance policies 1349216 and 1359066, and Ohio State Life Insurance policy 512,551.

of hearsay testimony, *see* McCormick on Evidence §246 (2d ed. 1972), and do not fall within any hearsay exception, the court will exclude them from consideration.

Edith and Stephanae also argue that the Michigan dead man's statute bars testimony by Lillie and by the other two witnesses as to their transactions with the deceased. They contend that both Brown and Hatchett were agents of Lillie and as such their testimony is to be considered as that of a party.

While the court referred to the Michigan dead man's statute in its September 27th Order, it has not specifically ruled on the applicability of Michigan law to the proffered testimony. The court noted at trial that this question was undecided and invited counsel to brief the issue. This matter is a complex one since in a diversity action this court sits as a court of the District of Columbia. The first determination then must be whether this court is to apply a federal rule to determine admissibility of the proffered testimony, or whether it should apply the law of the District of Columbia. If it applies federal law, the inquiry is simplified since the court need only seek guidance from federal sources. If the court is to apply District of Columbia law then the problem is more complicated, since the court must first decide whether a District of Columbia court would, in this interpleader action, apply its own dead man's statute, *see* 14 D.C. Code §302 (1973), or that of Michigan.

The dead man's statutes appear to fall into the gray area between rules which regulate only evidence and those which are closely associated with substantive rights. *See* C. Wright, Law of Federal Courts §93 at 413 (2d ed. 1970). Although the statutes are generally designed to guard against untruthful testimony that could only be rebutted by the deceased, they also protect the deceased's estate. For that reason state dead man's statutes are generally followed by federal courts in diversity actions. *See id.*; *Worthington Corp. v. Lease Management, Inc.*, 352 F.2d 24, 29 (6th Cir. 1965), *cert. denied*, 383 U.S. 937; *Wright v. Wilson*, 154 F.2d 616 (3d

Cir.), *cert. denied*, 329 U.S. 743 (1946). This conclusion is not, however, the only reasonable one. Rule 43(a) of the Federal Rules of Civil Procedure provides that evidence may be admitted if it is admissible under either a federal statute, federal equity practice, or under a statute of the forum state. This rule is one which favors admissibility, not exclusion. *See Monarch Insurance Co. v. Spach*, 281 F.2d 401, 409 (5th Cir. 1960). No federal statute would exclude this evidence and since interpleader actions have much of their basis in equity, *see* 3A J. Moore, Federal Practice ¶22.14[4], at 3113-14 (2d ed. 1974), it might be proper to decline to apply federal law. Moreover, under the Federal Rules of Evidence, effective July 1, 1975, the state statutes would apparently be disregarded. Rule 402 provides as follows:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Pub. L. No. 93-595 (Jan. 2, 1975). *See* C. Wright, Law of Federal Courts, *supra*. Therefore, if federal law were controlling, the testimony of Brown and Hatchett would not be barred. The court need not decide whether federal law or District of Columbia law controls unless those laws differ. The question then is what law a District of Columbia court would apply in this situation. The court is of the opinion that it would apply the District of Columbia, and not the Michigan, dead man's statute.

Where the laws of two jurisdictions are involved, in this Circuit the rule is that the forum applies the law of the state which has the more substantial interest in the resolution of the issue. *Blair v. Prudential Insurance Co. of America*, 472 F.2d 1356, 1359 (D.C. Cir. 1972); *Fowler v. A & A Company*, 262 A.2d 344, 348 (D.C. Ct. App. 1970). In the present case the laws in question are the dead man's statutes of the respective states. As noted above, the two purposes for

these statutes are to prevent untruthful evidence and to protect the deceased's estate. *See* 2 J. Wigmore, Evidence §578 (3d ed. 1940). Neither of these purposes are related to interests which Michigan wishes to protect. First, the state has no interest in the manner in which this court regulates the admissiblity of testimony or assures its accuracy. Second, the estate of the deceased, a Michigan resident, will not be increased or diminished by the manner in which the insurance proceeds are distributed. Moreover, while one of the claimants of the proceeds resides in Michigan, the others reside in New Jersey and the District of Columbia. Thus, Michigan has no substantial interest in having its dead man's statute applied by the District of Columbia court. The District of Columbia, on the other hand, has a very strong interest in the conduct of proceedings in its courts, and in ensuring that injustice is not committed by the exclusion of relevant evidence. Therefore, a District of Columbia court would apply its own dead man's statute in this proceeding.

The local statute, §14-302 of the District of Columbia Code, seeks to protect only persons legally representing the deceased against claims which may be fraudulent. The District of Columbia courts have held that in a contest over proceeds of an insurance policy, no one is legally representing the deceased. *See Rosenchein v. Citron,* 169 F.2d 885 (D.C. Cir. 1948). Moreover, the courts have frequently ruled that the dead man's statute should be strictly construed. As one court stated:

> "the statute should not be extended to prevent the living party from testifying to the truth or falsity of mere extraneous facts . . . not involving declarations or admissions of the deceased party."

Cafritz v. Corporation Audit Co., 60 F. Supp. 627, 632 (D.D.C. 1945), *aff'd in part, rev'd in part,* 156 F.2d 839 (D.C. Cir. 1946), *quoting Lockwood v. Rucker,* 34 App. D.C. 376, 381 (1910). Since the present situation involves a contest over insurance proceeds, and since the testimony proffered does not involve admissions or declarations by the

deceased, a District of Columbia court would not find the dead man's statute a bar to the proffered testimony. Since the testimony is admissible under either federal law or the law of the District of Columbia, the court need not choose between the two.

Edith and Stephanae introduced the entire depositions of Brown and Hatchett, and objections made at the deposition were not renewed. Even if they had been, the bulk of the deposition testimony is of a non-hearsay nature and is relevant to the issue at trial. The testimony shows that a Preliminary Injunctive Order was issued by the Wayne County Circuit Court on April 28, 1972 in connection with a suit instituted by Brown on behalf of Lillie. (Brown Dep. 12) Brown was her attorney and Hatchett was a law student employed by Brown's firm. (Hatchett Dep. 12, 31) Hatchett was instructed to serve process on Clemens, and Brown gave him a picture of a person Brown identified as Clemens. (Hatchell Dep. 23, 41) Hatchett first attempted to make service on April 28, 1972 at the Professional Building located on Woodward Avenue where Clemens maintained an office. (Hatchett Dep. 12-13) He was told by a receptionist that Clemens could be located at the Kirkwood Mental Health Clinic. (Hatchett Dep. 16) Hatchett then went to the law school. (Hatchett Dep 17) At approximately 3:30 p.m. he left the law school and drove to the Kirkwood Mental Health Clinic. (Hatchett Dep. 17-18) At the clinic he spoke to the man whose picture he had seen, and the man identified himself as Clemens. (Hatchett Dep. 23-24) Hatchett then made personal service of the papers, including the Injunctive Order, on Clemens. (Hatchett Dep. 8, 29-30) Later that day Hatchett went to Brown's law office and gave Brown a signed proof of service. (Hatchett Dep. 30) Approximately a year before the deposition Hatchett destroyed the log of service he had maintained. (Hatchett Dep. 31) Hatchett is now employed with the same law firm. (Hatchett Dep. 33-34) On February 28, 1974 he signed an Affidavit of Special Process Service relating to this matter. (Hatchett Dep. 31) The

documentation in his office which he relied upon was a duplicate copy of the Proof of Service which he executed. (Hatchett Dep. 31-32) However, the file for Lillie's case was never in his possession; he did not know whether it still existed. (Hatchett Dep. 34) and at the deposition he did not produce a copy of the Proof of Service or any record of it. (Hatchett Dep. 32)).

There is admittedly some conflict in the testimony of Hatchett and Brown. Brown testified that he obtained the process and Injunctive Order on April 28, 1972 and took them to the Professional Building on Woodward Avenue where he met his process server. (Brown Dep. 15) Hatchett testified that he picked up the papers at the law office, (Hatchett Dep. 42) and did not recall meeting Brown at the Professional Building. (Hatchett Dep. 42-43) The witnesses also disagreed as to the time of attempted service at the Professional Building, Hatchett placing it at around noon. (Hatchett Dep. 13), Brown at 2:00 to 2:30 p.m. (Brown Dep. 27)

The court does not find these inconsistencies so great as to cast doubt upon the veracity of the witnesses. They were deposed two and one-half years after the service was made, and neither had files with which to refresh their recollections. (Hatchett Dep. 34; Brown Dep. 25-26). Nonetheless, they both testified that an unsuccessful attempt to serve Clemens was made in the early afternoon of April 28th at the Professional Building, and that Brown did not go to the Kirkwood Mental Health Clinic later in the day.

Another discrepancy concerned whether a copy of a proof of service was generally kept in the law office. Although Brown testified that it was not (Brown Dep. 27), it does not mean that Hatchett did not see a copy as he testified. The court, therefore, finds by a preponderance of the evidence that service of the Preliminary Injunctive Order was made on Clemens on April 28, 1972 at the Kirkwood Mental Health Clinic. The court further finds by a preponderance of the evidence that Clemens had actual knowledge of the Injunctive

Order and that he violated its terms by changing the beneficiaries of the insurance policies at issue. In light of this determination, and for the reasons stated above and in the Order of this court filed September 27, 1974 and the Memorandum and Order filed February 6, 1975, the court finds that Lillie Fitzgerald is legally entitled to the proceeds of the policies before the court. An appropriate judgment will be entered.

/s/ Thomas A. Flannery
Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

4-21-1974
D a t e

APPENDIX 4

United States Court of Appeals
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 74-1485 September Term, 1974

Civil Action 1676-73

Connecticut General Life
Insurance Company, a corporation

v.

Lillie F. Fitzgerald,
Appellant

Edith L. Fitzgerald, et al.

Before: Wright and McGowan, Circuit Judges

ORDER

On consideration of appellant's motion to dismiss appeal, appellant's motion for an order directing the trial court to disburse funds, and of the responses to the foregoing, it is

ORDERED by the Court that appellant's motion for an order directing the trial court to disburse funds is denied, and, it is

FURTHER ORDERED by the Court that appellant's motion to dismiss appeal is granted, and, it is

FURTHER ORDERED by the Court that costs are awarded to appellee in the amount of $15.00, and, it is

FURTHER ORDERED by the Court that appellee's request for attorneys fees is denied.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

Per Curiam

APPENDIX 5

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1585
CONNECTICUT GENERAL LIFE INSURANCE COMPANY, A CORPORATION

v.

LILLIE F. FITZGERALD,
STEPHAENE FITZGERALD, APPELLANT

No. 75-1586
CONNECTICUT GENERAL LIFE INSURANCE COMPANY, A CORPORATION

v.

LILLIE F. FITZGERALD,
EDITH L. FITZGERALD, APPELLANT

No. 75-1587
LILLIE FITZGERALD
v.
THE OHIO STATE LIFE INSURANCE COMPANY, A CORPORATION, EDITH FITZGERALD, APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Actions 1676-73 & 1610-73)

Argued May 13, 1976
Decided May 27, 1977

Robert O. Chessman, for appellant in No. 75-1585. *Michael W. Faber* also entered an appearance for appellant in No. 75-1585.

M. Michael Klein for Edith Fitzgerald, appellant in Nos. 75-1586 and 75-1587 and appellee in No. 75-1585.

Clement Theodore Cooper for appellee Lillie F. Fitzgerald.

Before: BAZELON, *Chief Judge, McGOWAN and ROBB, Circuit Judges.*

Opinion Per Curiam.

PER CURIAM: This action in interpleader was begun by Connecticut General Life Insurance Company to settle a dispute between rival claimants to the proceeds of insurance policies issued on the life of Clemens H. Fitzgerald. The claimants, named as defendants in the action, were Lillie F. Fitzgerald, second wife of Clemens, Stephanae Fitzgerald, his daughter by a previous marriage, and Edith Fitzgerald, his mother. The District Court ruled that Lillie was entitled to the proceeds of the policies. We reverse.

The facts are largely undisputed. On June 26, 1970 Connecticut General Insurance Company issued to Clemens an

insurance policy naming Stephanae, his minor daughter, as primary beneficiary. The face amount of this policy was $50,000.00. On August 1, 1970 Connecticut General issued to Clemens another policy naming Edith, his mother, as beneficiary. The face amount of this policy was $30,000.00. On or about December 5, 1963 Ohio State Life Insurance Company issued to Clemens a policy naming Stephanae as beneficiary, the face amount of the policy being $15,000.00.

On May 4, 1971 Clemens and Lillie were married. On May 28, 1971 Clemens changed the beneficiary of the Ohio State policy by naming Lillie primary beneficiary; and on July 2, 1971 he changed the beneficiary of the Connecticut General policies by naming Lillie primary beneficiary.

On April 26, 1972 Clemens filed a complaint for divorce and on April 27, 1972, Lillie filed a complaint for separate maintenance, both suits being in the Circuit Court for Wayne County, Michigan. On April 28, 1972 Lillie obtained an ex parte preliminary injunction expressly restraining Clemens from, among other things, changing the beneficiaries of any insurance policy. No proof of service of this order was filed in the Wayne County Court. On May 19, 1972 the action for divorce and separate maintenance action were consolidated as one cause in Wayne County Court. Simultaneously on May 19, 1972 in the consolidated case, Lillie filed a counterclaim for divorce and obtained a second preliminary injunction against Clemens enjoining him from transferring or in any way disposing of his personal property.

On August 25, 1972 Clemens changed the beneficiary of the $15,000 Ohio State policy from Lillie to Edith, his mother. On August 28, 1972 he changed the beneficiary of the $50,000 Connecticut General policy from Lillie to Edith and Stephanae; and on November 20, 1972 he changed the beneficiary of the $30,000 Connecticut General policy from Lillie to Edith.

On March 20, 1973 a hearing in the Wayne County action was held before a referee. Present were Lillie, her counsel, and counsel for Clemens. Counsel advised the referee that "the

parties have reached an agreement as to the division of the property interests". (App. 36) The agreement provided that Lillie would receive $17,500 in cash, the furniture in the marital home and all her personal assets. Clemens was to receive the marital home and all his "stocks, bonds, business interests, and all other assets of the parties". He was to pay no alimony but would be responsible for the mortgage payments and all other expenses of the family home and for $2,500.00 of attorney's fees incurred by Lillie. Lillie agreed to withdraw her action to the complaint for divorce, thereby permitting the plaintiff to proceed on a *pro confesso* divorce. Lillie was sworn and testified under oath that she understood this agreement and acknowledged it as her own free act.

The settlement agreement was to be submitted for approval of the Wayne County Court as part of a final judgment of divorce on April 9, 1973. On April 3, 1973, however, Clemens died. After his death the divorce action was dismissed without prejudice and Lillie, the surviving spouse, sold the marital home for $66,500.00, netting $34,000.00.

The District Court held that if the April 28, 1972 injunctive order was served on Clemens his attempt to change beneficiaries, being in violation of that order, was invalid. After a hearing at which testimony was taken the court found by a preponderance of the evidence that the order was served on Clemens. Accordingly the court held that Lillie Fitzgerald was entitled to the proceeds of the policies.

We think however that service of the April 28 order is not the critical factor. In our view the issues are whether that order was superseded by the injunction of May 19, 1972, and whether the May 19 injunction forbade Clemens to change the beneficiaries. We think the April 28 injunction was superseded and the May 19 injunction did not prohibit the changing of beneficiaries.

The injunctive order of April 18, 1972 provided:

> IT IS ORDERED that CLEMENS H. FITZGERALD, JR., Defendant, his agents, servants, employees and attorneys, and any other persons in active concert or participation with them who actually receive actual notice of this injunctive order, do absolutely desist and refrain from harming, annoying, molesting, physically abusing or in any other manner interfering with the Plaintiff, LILLIE FITZGERALD, and from selling, assigning, encumbering, removing, *or otherwise disposing of any of the real or personal properties of the parties* hereto and more especially the home at 19380 Parkside Street, Detroit, Michigan, the bank accounts of the parties hereto, the household goods, furnishings and furniture of the parties hereto, *and from any way disposing of the parties' now existing insurance or changing the beneficiaries thereon.* (Emphasis supplied) [J.A. 243]

The order of May 19, 1972 provided:

> IT IS ORDERED AND ADJUDGED,
>
> That during the pendency of this action and until further order of this Court that a temporary restraining order issue as directed to the said plaintiff and cross-defendant restraining and enjoining him from withholding payments of mortgage payments, maintenance costs, utility bills including telephone, from withholding the payment of household help including domestic, laundress and gardener; that said plaintiff and cross-defendant be restrained and enjoined from concealing, transferring, withdrawing, assigning, encumbering *or in any manner disposing of any bank accounts, personal property or interests in real estate.* (Emphasis supplied) [J.A. 247]

The District Court ruled that the May 19 injunction applied to the changing of beneficiaries because it enjoined Clemens "from transferring or in any manner disposing of his personal property". [J.A. 338] We are unable to agree with this reasoning. Comparing the two orders it is apparent that the April 28 order treats disposing of Clemens' personal property and changing the beneficiaries of insurance policies as two separate and distinct items. Thus the order enjoined Clemens from "disposing of any of the real or personal properties of the parties . . . and from any way disposing of the parties'

now existing insurance or changing the beneficiaries thereon." If the phrase "disposing of personal properties" included insurance policies and the changing of beneficiaries, there would have been no need to make specific reference to the insurance and the changing of beneficiaries. It is therefore signficant, and we think decisive, that the injunction of May 19, while referring to the deposition of "personal property" made no reference to insurance policies or to any change of beneficiaries. We conclude therefore that because the April 28 injunction was superseded by that of May 19, which did not refer to insurance policies, Clemens was not forbidden to change the beneficiaries of his insurance policies when he took that action in August and November 1972. Accordingly Edith and Stephanae Fitzgerald are entitled to the proceeds of the policies and judgment must be entered to that effect.

The judgment of the District Court is

Reversed.

APPENDIX 6

United States Court of Appeals
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 75-1585 September Term, 1976

Civil Action 1676-73

Connecticut General Life
Insurance Company, a corporation

v.

Lillie F. Fitzgerald,
Stephanae Fitzgerald,
Appellant

and Consolidated Case Nos. 75-1586 and 75-1587

BEFORE: Bazelon, Chief Judge; McGowan and Robb, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellee Lillie F. Fitzgerald, it is

ORDERED by the Court that appellee's aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX 7

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 75-1585 September Term, 1976

Civil Action 1676-73

Connecticut General Life
Insurance Company, a corporation
v.
Lillie F. Fitzgerald,
Stephanae Fitzgerald,
Appellant

and Consolidated Case Nos. 75-1586 and 75-1587

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

On consideration of the suggestion for rehearing *en banc* filed by appellee Lillie F. Fitzgerald, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon would grant appellee's suggestion for rehearing *en banc*.

APPENDIX 8

United States Court of Appeals
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 75-1585 September Term, 1976

Civil Action 1676-73

Connecticut General Life
Insurance Company, a corporation

v.

Lillie F. Fitzgerald, et al.
Stephanae Fitzgerald,
Appellant

and Consolidated Case Nos. 75-1586 & 75-1587

BEFORE: Bazelon, Chief Judge; McGowan and Robb, Circuit Judges

ORDER

Upon consideration of the motion of appellee Lillie F. Fitzgerald for stay of mandate pending filing of petition for certiorari, it is

ORDERED by the Court that appellee's aforesaid motion is granted, and the Clerk is directed not to issue the mandate in this case prior to August 1, 1977.

Per Curiam
For the Court:

GEORGE A. FISHER
Clerk

CERTIFICATE OF SERVICE

This is to certify that a copy of Petition for Writ of Certiorari was mailed, postage prepaid, to the following Counsel of Record:

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